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No. 92-393

In The

Supreme Court of the United States

October Term, 1992

MARIA DEL ROSARIO C. FRAIRE, Individually and as Next Friend for MYRA FRAIRE and JUAN ANTONIO FRAIRE, Minor Children, and JOSEFA ESQUIVEL FRAIRE,

Petitioners,

v.

CITY OF ARLINGTON AND JAMES W. LOWERY, JR.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT CITY OF ARLINGTON'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, under 42 U.S.C. § 1983, a municipal policy or custom authorizing or condoning the use of excessive force by police officers in violation of the Fourth Amendment can be inferred from a single failure of a municipality to discipline a single police officer for a single alleged use of excessive force.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondent City of Arlington, Texas ("Arlington") respectfully requests that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 957 F.2d 1268.

I. STATEMENT OF THE CASE

A. On November 22, 1987, in Arlington, Texas, Respondent James W. Lowery, Jr. ("Lowery") shot Javier Fraire ("Fraire") in self-defense as Frai.e attempted to drive over Lowery with his pickup truck.

B. Arlington does not in any way adopt or endorse Petitioners' version of the incident on November 22, 1987, which contains inaccuracies and baseless conclusions and allegations. The Fifth Circuit had before it the fully-developed summary judgment record and has objectively recited the facts in its opinion. For the sake of brevity and to avoid repetition, Arlington adopts and incorporates by reference the operable facts in the Fifth Circuit opinion. *Fraire*, 957 F.2d at 1270-1272.

C. Contrary to Petitioners' version, not every eyewitness contradicted Lowery's version of the story. Sworn statements of at least three eyewitnesses confirm Lowery's statement that he verbally identified himself as a police officer to Fraire, that Fraire then suddenly and rapidly accelerated his pickup truck directly at Lowery and that Lowery fired his firearm at the fast approaching pickup truck only at the last moment. *See Id.* at 1271-1272, 1274.

D. Also contrary to Petitioners' version, the Arlington Police Department's internal affairs investigation does not repudiate Lowery's version of the incident of November 22, 1987. The report concluded that Lowery fired his weapon in self-defense consistent with the police department's written deadly force policy and Texas law. Beyond Petitioners' mere conjecture, there is no evidence that Lowery lied or concocted his version of the incident of November 22, 1987. There is no evidence that Arlington knew of any alleged lying by Lowery. *Id.* at 1279.

E. On November 17, 1989, Petitioners initiated their cause of action against Arlington and Lowery under 42 U.S.C. § 1983. After sixteen months of discovery, Petitioners were granted leave to file an amended complaint. In their amended complaint, Petitioners allege only a single, isolated use of excessive force by Lowery. Further, they allege only a single, isolated failure by Arlington to discipline Lowery for the alleged use of excessive force. They also allege that Arlington had constitutionally deficient policies and procedures regulating the use of deadly force by its police officers.

F. Arlington filed its motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure or, in the alternative, for summary judgment under Rule 56. Among the summary judgment evidence produced by Arlington is the affidavit of David M. Kunkle, Arlington Chief of Police. ("Chief Kunkle") Chief Kunkle's testimony is unchallenged and uncontroverted by Petitioners.

G. Chief Kunkle testifies that he is responsible for the immediate direction and control of the Arlington Police Department and issues the department's written General Orders which are policies and procedures that primarily control the conduct of Arlington police officers. He is ultimately responsible in Arlington for enforcing the General Orders, for the investigation of police misconduct and the use of deadly force by Arlington officers, and for the disciplining of officers for violations of the General Orders and state and federal law.

H. Chief Kunkle testifies in his affidavit that the use of excessive force by Arlington police officers is prohibited by the written deadly force policy in the Arlington Police Department's General Orders. *See Id.* at 1279-1280. Chief Kunkle further testifies that

the department's General Orders have written procedures whereby complaints of the illegal use of excessive force or of deadly force are investigated by the department. In fact, all uses of deadly force by Arlington officers are required to be investigated by the General Orders. During Chief Kunkle's tenure, all uses of deadly force and all complaints of police misconduct, including complaints of excessive use of force, have been investigated pursuant to the General Orders. Chief Kunkle further testifies that, when violations of the General Orders and complaints of misconduct, including the illegal use of excessive force, are sustained by the investigation, the police officer is disciplined and may be reassigned or given additional training depending upon the circumstances.

I. There is no allegation and no evidence in the record that, prior or subsequent to November 22, 1987, there has been a series or pattern of excessive use of force committed by Lowery or by other Arlington police officers. There is no allegation and no evidence that, prior or subsequent to November 22, 1987, police misconduct and misbehavior were widespread throughout the Arlington Police Department. There is no allegation and no evidence that Chief Kunkle has consistently failed to investigate or to discipline Arlington police officers for excessive use of force or other misconduct committed in the performance of their duties. There is no allegation and no evidence that the disciplinary procedures utilized by the Arlington Police Department are so inadequate that a police officer who engages in misconduct can be assured of going unpunished by Chief Kunkle.

J. The district court ruled that the Section 1983 action against Arlington should be dismissed, not only because the amended complaint failed to allege a cause of action, but also because Petitioners failed to

meet their summary judgment burden under Rule 56 of the Federal Rules of Civil Procedure to produce specific facts showing a genuine issue of material fact for trial in response to Arlington's motion. *See Id.* 1272, 1278.

K. On appeal before the Fifth Circuit, Petitioners raised only two issues: (1) whether a municipal custom or policy authorizing the use of excessive force can be inferred from Arlington's single failure to discipline Lowery for a single alleged use of excessive force; and (2) whether Arlington's written deadly force policy in the police department's General Orders in effect on November 22, 1987 was constitutionally deficient.

L. As the district court, the Fifth Circuit ruled that, not only did Petitioners' amended complaint fail to state a cause of action under 42 U.S.C. § 1983 but that Petitioners did not overcome their burden under Rule 56 of producing specific facts showing a genuine issue of material fact for trial. Petitioners had failed to show any more than a single, isolated incident of illegality. *Id.* 1278-79.

M. With respect to the second issue raised, the Fifth Circuit specifically found that Arlington's written deadly force policy in the police department's General Orders was consistent with and, in fact, was more restrictive than the Fourth Amendment requirements expressed by this Court in *Tennessee v. Garner*, 471 U.S. 1 (1985). *Id.* at 1280. Petitioners do not challenge this portion of the Fifth Circuit's opinion or the constitutionality of Arlington's deadly force policy in any respect in their Petition before this Court.

II. REASONS FOR DENYING THE WRIT

A. The Fifth Circuit's opinion is consistent with the prior decisions of this Court.

In their Petition, Petitioners challenge the Fifth Circuit's holding that their proof of a single decision not to discipline Lowery for a single use of alleged excessive force is insufficient to establish a municipal custom or policy condoning or authorizing the illegal use of excessive force.

In *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), this Court held that municipalities may be liable for damages under 42 U.S.C. § 1983, but only where an official policy or governmental custom of the municipality caused the deprivation or violation of the constitutional rights complained of by the plaintiff. The Court expressly rejected governmental *respondeat superior* as a basis for liability under Section 1983. A municipality cannot be held liable solely because it employs a tortfeasor. *Id.* at 691. The municipal policy or custom must cause the employee to violate another's constitutional rights:

> [I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983.

Id. at 694. Thus, Section 1983 liability attaches "only where the municipality *itself* causes the constitutional violation at issue." *City of Canton v. Harris*, 489 U.S. 378, 385 (1989) (emphasis in original).

The only question of municipal liability under Section 1983 presented by Petitioner in their Petition is whether the allegation and proof of a single failure of a municipality to discipline a single police officer for a single act of alleged excessive force is sufficient to establish a municipal custom or policy authorizing excessive force in violation of the Fourth Amendment. This Court has already answered that question in *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

Tuttle was this Court's first effort to expand upon the custom or policy requirement of *Monell*. The trial court in *Tuttle* had instructed the jury that a single unusually excessive use of force may be sufficient to warrant an inference of custom or policy such as to render the municipality liable under Section 1983. The plurality opinion in *Tuttle* disapproved of the inference:

> Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policy-maker . . . [W]here the policy relied upon is not itself unconstitutional, considerable more proof than a single incident must be necessary in every case to establish both the requisite fault on the part of the municipality and the causal connection between the "policy" and the constitutional deprivation.

Id. at 824. (plurality opinion by Rehnquist, J.)

Even the concurring opinion agreed that a single isolated incident of police misconduct is insufficient to establish a municipal policy or custom:

> . . . To infer the existence of a city policy from the isolated misconduct of a single, low-level officer, and then to hold the city liable on the basis of that policy, would amount to permitting precisely the theory of strict *respondeat superior* rejected in *Monell*. . . .
>
> . . . [T]he scope of § 1983 liability does not permit such liability to be imposed merely on evidence of the wrongful actions of a single city employee not authorized to make city policy. . . .

Id. at 831, 833 (concurring opinion by Brennan, J.)

The Fifth Circuit's opinion is consistent with the Court's plurality and concurring opinions in *Tuttle*. *Fraire*, 957 at 1278-1279. In their Petition, Petitioners have failed to distinguish their case from *Tuttle*. They do not challenge the constitutionality of the Arlington Police Department's written deadly force policy. They do not submit proof of any more than a single isolated decision not to discipline a single officer for a single act of alleged misconduct.

Petitioners instead rely upon this Court's decision in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). To support their reliance, they quote out-of-context a couple of phrases from the Court's opinion. In *Pembaur*, county deputy sheriffs attempted to serve capiases on two employees at a physician's clinic. The physician refused to allow the deputies to enter the clinic to search for the employees. After being informed of this situation by the

deputies, the county prosecutor instructed the deputy sheriffs to "go in and get the witnesses." Acting on these instructions, the deputy sheriffs forcibly entered and searched the clinic for the two witnesses. *Id.* at 473.

The issue on appeal was whether or not the county had an official policy which caused the constitutional violation. The Court was particularly concerned with the court of appeals holding that a single decision by a municipal policymaker to take a particular action cannot establish the kind of official policy required by *Monell.* The Court reversed and held that a municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances:

> If the decision to adopt that particular course of action is appropriately made by that government's authorized decisionmakers, it surely represents an act of official "government policy" as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly.

Pembaur, at 481.

The Court found that the county prosecutor was a final decisionmaker or policymaker for the county. Therefore, the county was liable under Section 1983 because the prosecutor's instructions to the deputy sheriffs constituted county policy and because those instructions (the policy) caused the constitutional violation. In effect, the actions of the prosecutor directly caused the constitutional violation.

The facts of the case before the Court are very different. Fraire was shot by Lowery, who is a police officer in the Arlington Police Department. Appellants neither allege nor produce any evidence that Lowery is a final decisionmaker or policymaker for Arlington. Based upon the summary judgment evidence in the record, the final decisionmaker or policymaker for Arlington on police matters is Chief Kunkle. Chief Kunkle did not order or direct Lowery to stop or to shoot Fraire. He did not participate in any way in this incident or the events that led to the shooting. He did not supervise or direct Lowery's conduct at any time. The acts and conduct which caused the shooting and death of Fraire were not the acts and conduct of Chief Kunkle. Chief Kunkle did nothing to cause the shooting of Fraire by Lowery. Because Lowery is not an official in Arlington with final decisionmaking or policymaking authority, his conduct and acts during the single incident on November 22, 1987 cannot be attributed to Arlington under Section 1983. To do otherwise in this case would be to hold Arlington liable under the doctrine of *respondeat superior*. *Pembaur*, therefore, is inapplicable to Petitioners' case.

Furthermore, there is no allegation and no evidence produced by Petitioners that Arlington's failure to discipline Lowery caused Lowery to use excessive force. This Court has expressed the causation element in Section 1983 cases in different ways. *Polk County v. Dodson*, 454 U.S. 312, 326 (1981) (the municipal policy must be "the moving force of the constitutional violation"); *Tuttle*, 470 U.S. at 823, ("there must be an affirmative link between the policy and the particular constitutional violation alleged"); and *City of Canton*, 489 U.S. at 385 (there must

be a "direct causal link" between the municipal policy or custom and the alleged constitutional deprivation). The common elements to these expressions are nexus and causation, neither of which is alleged or shown by Petitioners.

Petitioners fail to show or to explain how the single failure to discipline Lowery and the subsequent investigation of the incident by the Arlington Police Department caused Lowery to shoot Fraire on November 22, 1987. Upon what basis could Lowery have believed that he was free to engage in misconduct by using excessive force on November 22, 1987, that the police department would conduct an investigation finding that he had not engaged in misconduct, and that Chief Kunkle would not discipline him for the misconduct? Given the uncontroverted testimony of Chief Kunkle regarding Arlington's policy of disciplining police officers for misconduct, including the use of excessive force, how was Lowery to know that, if he engaged in such misconduct, he alone for some reason would go unpunished?

Petitioners do not allege or show that Lowery has ever engaged in any prior or subsequent act constituting misconduct, including the use of excessive force or illegal use of deadly force. They do not allege or show that Lowery has engaged in any prior or subsequent acts of misconduct or misbehavior for which he was not disciplined by Arlington. They do not allege or show any prior acts of misconduct by any other Arlington officers where the officers were not punished. There was no reason for Lowery to believe that he would not be disciplined for misconduct. There is no evidence that Chief Kunkle's decision not to discipline caused Lowery to

engage in the misconduct, if any, alleged by Petitioners. Indeed, the clear cause of Lowery's use of deadly force was Fraire's attempt to run over him with his pick-up truck.

B. There is No Conflict Among the Courts of Appeals.

As Petitioners concede, federal circuits throughout the country uniformly require more than a single failure to discipline a single police officer to establish a municipal custom or policy under Section 1983. These courts have found that the municipality's failure to discipline a single police officer or to take other corrective steps in response to a single incident is insufficient to constitute a policy of acquiescence, encouragement, or ratification of unconstitutional conduct. Only where there is a pattern of repeated constitutionally offensive conduct by police officers of which the policymaker has or should have knowledge and where the policymaker has persistently failed to take remedial or corrective steps can a municipal policy of acquiescence, encouragement, or ratification of unconstitutional police conduct be inferred. *Carter v. District of Columbia*, 795 F.2d 116 (D.C. Cir. 1986); *Santiago v. Fenton*, 891 F.2d 373, 380-382 (1st Cir. 1989); *Batista v. Rodriguez*, 702 F.2d 393, 397-398 (2nd Cir. 1983); *Losch v. Borough of Parkesburg*, 736 F.2d 903, 910 (3rd Cir. 1984); *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987), *cert. denied sub nom. City of Fayetteville, N.C. v. Spell*, 484 U.S. 1027 (1988); *Berry v. McLemore*, 670 F.2d 30 (5th Cir. 1982), *overruled on other grounds, Interñational Woodworkers of America v. Champion International Corporation*, 790 F.2d 1174, 1181

(5th Cir. 1986); *Harris v. City of Pagedale*, 821 F.2d 499 (8th Cir. 1986) *cert. den'd* 484 U.S. 986 (1987); *Davis v. City of Ellensburg*, 869 F.2d 1230, 1233-1235 (9th Cir. 1989); *Cowdrey v. City of Eastborough*, 730 F.2d 1376, 1379 (10th Cir. 1984); and *Depew v. City of St. Marys*, 787 F.2d 1496, 1499 (11th Cir. 1986).

Petitioners cite only three cases in their Petition which they contend are conflicting opinions. They attempt to manufacture this alleged conflict by quoting out-of-context one or two sentences from each case. These three cases are easily distinguishable from Petitioners' case and Arlington asserts that they do not represent a conflict among the circuits.

For example, in *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987) cited by Petitioners, the evidence did not show a single incident involving a single police officer. In fact, the Fifth Circuit in *Grandstaff* acknowledged that, under *Tuttle*, isolated incidents of police misconduct are inadequate to prove the knowledge and acquiescence of a municipal policymaker in the manner of the misbehavior. *Id.* at 171. However, the evidence showed several repeated acts of abuse committed by several police officers in several episodes. The entire six officers of the night shift of the police department were involved in these acts. The Fifth Circuit concluded that this widespread misconduct tended "to prove a disposition to disregard human life and safety so prevalent as to be police policy or custom." *Id.* Given the widespread participation of the officers in the gross misbehavior and dangerous recklessness and the police chief's failure to take subsequent disciplinary or corrective measures, a jury could find that dangerous

recklessness on the part of these police officers was "accepted as the way things are done and have been done in the City of Borger". *Id.*

The facts of the case before the Court are different in several respects. The pleadings and summary judgment evidence show only one Arlington police officer involved in a single act of alleged misconduct, that is, the shooting of Fraire. There is no evidence of repeated acts of abuse by several Arlington police officers in several episodes leading to the shooting of Fraire. There is nothing about the shooting of Fraire by Lowery which would lead Chief Kunkle to believe that dangerous recklessness and police misconduct were rampant throughout the Arlington Police Department and that some disciplinary action was required.

Further, the holding in *Grandstaff* has been limited to its facts by the Fifth Circuit in *Coon v. Ledbetter*, 780 F.2d 1158 (5th Cir. 1986). *See also, Stokes v. Bullins*, 844 F.2d 269, 274 n. 8 (5th Cir. 1988). In *Coon*, the court specifically rejected the plaintiff's argument that, under *Grandstaff*, the county could be held liable because the sheriff ratified his deputies' conduct after the event:

> *Grandstaff*, however, does *not* stand for the broad proposition that if a policymaker defends his subordinates and if those subordinates are later found to have broken the law, then the illegal behavior can be assumed to have resulted from an official policy. Rather, *Grandstaff* affirmed a judgment against a Texas city on a highly peculiar set of facts. The *Grandstaff* panel emphasized the extraordinary facts of the case, and its analysis can be applied only to equally extreme factual situations.

Coon, at 1161 (emphasis in original). Therefore, *Grandstaff* clearly does not support Petitioners' claim that a municipal policy can be inferred from a single failure to discipline a single police officer for a single incident of misconduct and does not conflict with other circuits.

The Ninth Circuit's holding in *McRorie v. Shimoda*, 795 F.2d 780 (9th Cir. 1986) is similar to *Grandstaff*. In *McRorie*, a prison guard brutalized a prisoner during a strip search after a shakedown at the prison. The prisoner alleged that this was not an isolated attack but that prison guards injured him and 28 other inmates at the same time and one guard was acting under the orders of his supervisors. There were no facts produced by the defendants about how or whether prison officials responded to these incidents of alleged abuse. *Id.* at 782-784. Unlike the case before the Court, the prisoner in *McRorie* claimed several incidents involving several government employees. *McRorie* clearly does not support Petitioners' theory of their case and does not conflict with the prevailing view in the federal circuits.

Finally, in *Slakan v. Porter*, 737 S.W.2d 368 (4th Cir. 1984), a prisoner filed suit against three guards and three high-ranking prison supervisory officials for brutality. At trial, there was evidence of several prior acts of misconduct of which supervisors were aware and about which they did nothing. First, this is not a municipal or governmental liability case but rather a supervisory liability case. *Id.* at 372-3. The liability of the governmental entity, if any, is not discussed. Second, the Fourth Circuit recognizes that a plaintiff "cannot satisfy his burden of proof by pointing to a single incident or isolated incidents." Supervisory liability requires evidence of "continued

inaction in the face of documented widespread abuses." *Id.* This opinion is not in conflict but is, in fact, clearly consistent with the Fifth Circuit opinion in *Fraire* and the other cases cited above.

C. There is no evidence that Arlington failed to investigate the shooting of Fraire objectively and impartially.

Petitioner also requests *certiorari* because, they assert, "a municipality's failure to objectively and impartially investigate the conduct of its own employees . . . should entail the potential for civil liability."

First, there is no evidence that the Fraire shooting was not impartially or objectively investigated. During the preceding sixteen months of discovery, the entire internal investigation was produced. There were no discovery battles in this lawsuit where Arlington sought to protect the investigation from discovery. Petitioners concede that detailed written statements were taken from Lowery and other witnesses and that a detailed written report of the investigation was prepared. The investigation was in fact thorough and detailed. Petitioners do not point in their Petition to anything the police department should have done differently in its investigation, other than to arrive at a different conclusion.

Second, Petitioners' bald allegations and conjecture that Lowery was not telling the truth, that Arlington knew Lowery was not being truthful, that Lowery "manufactured a scenario" and that the internal affairs investigation report refutes Lowery's version of the incident have no basis in fact and are completely unsupported by

any evidence in the record. Petitioners' assertion that the internal affairs report refutes Lowery's version is particularly ludicrous in light of the conclusion that Lowery acted in self-defense in conformity with Arlington's written deadly force policy and Texas law.

Third, in requesting *certiorari* for this reason, Petitioners seek to expand municipal liability under Section 1983 and to open the federal courts to reviewing every police internal affairs investigation where a plaintiff alleges an incorrect decision was made. Under Petitioners' proposal, every alleged unreasonable, incorrect or unwise disciplinary decision made by a police chief should subject a municipality to potential liability under Section 1983, even for a single isolated incident of alleged illegality. The effect of Petitioners' proposal would be to impose liability on municipalities based upon *respondent superior* and to eliminate the causation element from causes of action under Section 1983. Such a strict liability standard has been rejected by this Court in *Monell* and subsequent Section 1983 cases and should continue to be rejected.

Lastly, Petitioners' real complaint here is they do not agree with the conclusions of Arlington's investigation. They want this Court to believe that there was no justification for the findings of the police investigation and that these findings are wrong. The investigation of this shooting has now been studied and analyzed by two objective and impartial bodies – the district court and the Fifth Circuit. Each court has objectively and impartially examined the record, including the same statements examined by the internal affairs investigation and Chief Kunkle, and has come to the same conclusion – Lowery

was reasonable in his belief that the shooting of Fraire was reasonably and immediately necessary to protect his own life. How, then, can Arlington's conclusions and findings be so unreasonable and unjustified?

III. CONCLUSION

Therefore, for the reasons cited above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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